

September 13, 2006

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Re: *Diamond Restoration, Inc. v. Thomas Kreske*
Case No.: 2005-07-373

Date Submitted: August 28, 2006
Date Decided: September 13, 2006

LETTER OPINION

Dear Counsel:

Trial in the above captioned matter took place on Monday, August 29, 2006 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of evidence and testimony the Court reserved decision. This is the Court's Final Decision and Order.

THE FACTS

Plaintiff, Diamond Restoration Inc, ("Diamond") filed the instant civil Complaint against Thomas Kreske ("Kreske") alleging "an intentional or wanton breach of a contract" the parties executed on or about November 11, 2004. Diamond is in the business of removing damaged property and restoring premises caused by flooding. (Exhibit A to the Complaint) Defendant allegedly granted Diamond authorization in writing to perform certain restoration work described in the cost estimate attached to the Complaint in the amount of \$17,378.32 (Exhibit B). The

parties allegedly agreed according to plaintiff's complaint that should defendant be compensated by his insurance carrier Kreske would then endorse the insurance proceeds check to the plaintiff. Diamond claims in its complaint that it performed the restoration services and was not paid.

The defendant answered the Complaint pro-se initially and denied all allegations. Mr. Ramunno entered his appearance before trial.

At trial the following parties presented testimony.¹

At trial Timothy McCormick ("McCormick") testified as follows. He is the owner and Chief Executive Officer of Diamond. McCormick performs estimating work for his company and oversees his employee's performance. Diamond deals with fire and water restoration such as carpet and upholstery cleaning and repairing damage caused by flooding. Based upon a telephone call to his office, McCormick spoke with Kreske at his residence, because he had called him on or about November 5, 2004. He observed the damaged caused by the hurricane and provided a written estimate to Kreske, which was received into evidence (Plaintiff's Exhibit 1). McCormick read into the record paragraph 3 of Plaintiff's Exhibit 1 where the following was set forth in the signed document by Mr. Thomas Kreske:

¹ At trial, Diamond presented a list of trial exhibits which were moved into evidence without objection. Plaintiff's Exhibit 1 was the authorization to perform services described in the initial complaint; Plaintiff's Exhibit 2 was the Certificate of Satisfaction undated signed by the defendant which is incorporated by reference herein that the repairs and restoration have been satisfactorily completed in a professional workmanlike manner; Plaintiff's Exhibit 3 was a copy of Diamond's estimate provided to defendant; Plaintiff's Exhibit 4 was a FEMA check dated November 16, 2004 in the amount of \$36,230.59 paid to Thomas Kreske; Plaintiff's Exhibit 5 was marked for identification purposes only dealing with the statute of limitations; Plaintiff's Exhibit 6 was a flood policy declaration from the National Flood Insurance Program, Rockville, Maryland which sets forth the insurance coverage allegedly provided to Thomas Kreske; Plaintiff's Exhibit 7 was an identification marked for B purposes only which was a letter from New Castle County Department of Land Use Charles L. Baker; Plaintiff's Exhibit 8 was a Loss Proceeds Disbursement Check Voucher made out to Thomas Kreske in the amount of \$18,115.29 from National City Mortgage; Plaintiff's Exhibit 9 was a statement to Thomas Kreske from the National Flood Insurance Program dealing with the costs to repair the subject property; Plaintiff's Exhibit 10 was an Emergency Response Report from the Department of Land Use; Plaintiff's Exhibit 11 was a letter from the Consumer Services Division, Department of Insurance to Mr. Thomas Kreske in response to numerous complaints he filed with the Department of Insurance; Plaintiff's 12 was a letter signed by Rose Feher and Thomas Kreske seeking assistance regarding the flooding of their property; Plaintiff's 13 was an exhibit marked for identification purposes only "C" which is a letter from the National City Mortgage Company to Thomas Kreske. Plaintiff's Exhibit 14 was marked "D" for identification purposes only which is a letter dated April 12, 2006 to Thomas Kreske from National City Mortgage.

It is fully understood that Customer and its agents, successors, assigns and heirs are personally responsible for any and all deductibles, depreciation, or any cost not covered by insurance. Any and all charges for services not reimbursed by the Insurance Company are the responsibility of the customer and are to be paid upon the completion of the work.

According to McCormick, he informed Kreske that 50-60 percent of the \$17,378.32 estimate to repair his residence was mold damage which would not be covered by insurance coverage monies. This representation was allegedly in accordance with FEMA policy and directives which does not cover mold damage.

According to McCormick, Kreske also signed the Certificate of Satisfaction and certified the work at his residence was done in a workmanlike manner. According to Plaintiff's Exhibit 2, paragraph 2 of the Certificate of Satisfaction required Kreske to notify Diamond immediately if there was any problem or complaint and alert Diamond to correct these problems. According to McCormick, Kreske never contacted him with any concern. McCormick also presented testimony that Kreske asserted no complaints in any of the letters he wrote to different insurance companies and state agencies. Kreske also never contacted McCormick to complain of any dissatisfaction with Diamond's work or performance. According to McCormick, none of the insurance monies had been paid from Kreske's insurance proceeds. McCormick testified Kreske agreed to endorse the check at the time he received it from his insurance company referenced above. Kreske allegedly told McCormick "I am not paying you because I will not have enough money to fix up my house."²

On cross-examination, McCormick testified that in November 2004 he went to Kreske's home and prepared an estimate, which he believed to have occurred on November 11, 2004. McCormick testified he worked approximately four – six weeks on the entire project at Kreske's

² The record was created that Plaintiff's Exhibits 1, 2, 3, 4, 6, 8, 9, 10, and 11 were moved into evidence without objection by the defendant.

residence and completed the contract satisfactorily. The hurricane allegedly occurred September 28, 2004 which damaged Kreske's house. Diamond removed wood, water, replaced portions of the furnace, and generally cleaned up the storm damage at Kreske's house. Diamond also removed mud from the basement and specifically informed Kreske that the mold would not be covered by insurance monies. McCormick agreed based upon a review of the FEMA estimate and documents that he informed Kreske that he had sufficient coverage to pay the monies to Diamond when he completed the work. McCormick also testified that given the fact that mold was approximately 50-60 percent of the \$17,000.00 plus estimate the insurance company would only pay 40 percent.

On re-direct examination McCormick testified that the sink and tub were kept by Kreske and not discarded and therefore he took these items out of his estimate.

Thomas Kreske ("Kreske") testified at trial. Kreske is employed in the construction industry as a contractor performing concrete work. He resides at 63 Meadows Road, New Castle, Delaware. His property was damaged by Hurricane Jeanne. Kreske called various companies and spoke with Diamond. He requested that Diamond provide the instant services after meeting with McCormick at his residence on or about November 5, 2004. Kreske maintained two types of insurance; one from FEMA for flood insurance through Nickel Insurance Agency and also a separate policy with Nationwide Insurance Company. The FEMA insurance policy totaled the coverage \$125,000.00 through Nickel. The Declaration sheet marked as Exhibit 6 was received into evidence. Approximately half way down the Declaration page there was a notation that included \$126,000.00 in insurance coverage.

Kreske was further questioned about the estimate and authorization to perform services which provided that, *inter alia*, he must reimburse Diamond any monies not covered by

insurance. According to Kreske all the language is clearly set forth and language but claims he didn't read the document before he signed it. *See*: Plaintiff's Exhibit 4. Also presented at trial was a check for \$36,230.59 for the storm damage. Kreske also agreed that he made no complaints about Diamond's work to McCormick or any of the other state agencies he wrote about his insurance problems. Kreske also agreed he received a check for approximately \$18,000.00 from National City Mortgage when they returned monies back to him after endorsing and forwarding the original \$36,230.99 insurance proceeds; said amount was ½ of the insurance check; yet he never endorsed the same over to Diamond. Kreske claims he was "confused" but agrees of the \$36,000.00 in excess monies he was returned half back to National City Mortgage. Kreske never endorsed the check and it "eventually died." Plaintiff's Exhibit 5 was shown to Kreske which was a copy of the \$18,115.29 check.

According to Kreske, National City Mortgage still has \$36,230.59 "waiting for him".

Kreske testified Rose Feher ("Feher") was his girlfriend. She resided with him and she wrote the letter which is depicted in Exhibits 10 and 11.

On cross-examination by his counsel, Kreske testified he was not informed by McCormick about the non-coverage for the mold and McCormick actually offered to double his deductible.³

The defense put on his case-in-chief. Feher was sworn and testified. She is Kreske's girlfriend of ten years and resides with him at 63 Meadow Road. Feher testified she was present when the hurricane destroyed the home. In September 2004 she observed and spoke with Tim McCormick from Diamond. According to Feher, McCormick told Kreske, "don't worry; you

³ At the close of plaintiff's case-in-chief, defendant presented a C.C.P. Civ. R. 50 Motion for Directed Verdict, following oral argument, the Court denied that Motion in an oral bench ruling. *See e.g., McCarthy v. Mayor of Wilmington, Del. Super., 48 Del. 201, 100 A.2d 739 (1951)*. The Court defers to its actual ruling on the record for the factual basis for its ruling as well as the list of case citations stated on the record.

have sufficient insurance.” Feher wrote a letter that is depicted in Plaintiff’s Exhibit 11 attempting to resolve the issues with Kreske’s insurance carrier. Feher agreed that Kreske had a policy for insurance with FEMA and that he endorsed the check for \$36,230.59 over to the National City Mortgage Company. Feher also agreed that she made previous statements at here deposition that she had no problem with Diamond work.

Edward Szulvorksi (“Szulvorski”) was sworn and testified. He is a “good friend” of Kreske. He was present during a couple of conversations with McCormick at Kreske’s house. According to the Szulvorski, Kreske corrected a bill which caused McCormick to revise Diamond’s estimate and Kreske allegedly made a statement that “this is insurance fraud”.

On cross- examination Szulvorski was corrected in that he did not, nor was he present at the first meeting between Kreske and McCormick.

McCormick was recalled, he agrees the first estimate was correct and he never received any check or monies from Kreske as payment for his services.

THE LAW

"When there is a written contract, the plain language of a contract will be given its plain meaning." Phillips Home Builders v. Travelers Ins. Co., 700 A.2d 127, 129 (1997). "The party first guilty of material breach of contract cannot complaint if the other party subsequently refuses to perform." Hudson v. D.V. Mason Contractors, Inc., Del. Super. 252 A.2d 166, 170 (1969). "In order to recover damages for any breach of contract, plaintiff must demonstrate substantial compliance with all the provisions of the contract." Emmett Hickman Co., v. Emilio Capano Developer, Inc., Del. Super., 251 A.2d 571, 573 (1969). "Damages for breach of contract will be in amount sufficient to return the party damaged to the position that the party would have been in had the breach not occurred." Delaware Limousine Services, Inc. v. Royal Limousine Service, Inc., 1991 Del. Super., LEXIS 130, Del. Super., C.A. No. 87-C-FE-104, Goldstein, J. (April 5, 1991).

"At the same time, however, a party has a duty to mitigate once a material breach of contract occurs." Lowe v. Bennett, 1994 Del.

Super., LEXIS 628, 1994 WL 750378, Graves, J. (December 29, 1994). "Whether a breach is material and justifies non-performance is a matter of degree and is determined by weighing the consequences in light of the contract." Eastern Electric & Heating v. Pike Creek Professional Center, 1987 Del. Super. LEXIS 1115, 1987 WL 9610 (April 7, 1987). "Notwithstanding a material failure to perform, the complaining party, may nevertheless, recover the value of benefit conferred upon the other party." Heitz v. Sayers, 32 Del. 207, 121 A. 225 (1923).

Finally, if there is an ambiguity in the terms or drafting of the contract, "that ambiguity will be resolved against the party who drafted the contract." See. e.g., *E.I. dupont de Nemours & Co. v. Shell Oil Co.*, Del. Super., 498 A.2d 1108 (1985).

Kathleen M. Braxton v. Adirondack Group, Inc., 2003 Del. C.P. Lexis 32, C.A.

No.: 2001-12-198, Welch. J (August 11, 2003)

OPINION AND ORDER

It is clear based upon the totality of the circumstances, evidence and sworn testimony at trial that plaintiff has proven the instant complaint by a preponderance of evidence and plaintiff should be awarded the judgment of the complaint in the amount of \$17,378.32. See e.g. *Reynolds v. Reynolds*, Del. Supr., 727 A.2d 708 (December 28, 1967); *Nastos v. Hallak*, 2004 Del. C.P. Lexis 19, Welch, J. (May 19, 2004); *Orsini Top Soil v. Carter*, 2004 Del. C.P. Lexis 17, Welch, J. (May 18, 2004). Kreske offered no defense as to why he has not endorsed his insurance proceeds over to Diamond. Nor has Kreske offered any factual or legal defense as to why he has not paid plaintiff for the services rendered under the contract entered into between the parties. It is also clear that there is overwhelming evidence that there was a bona fide written contract between the parties; that it was plain and unambiguous and that plaintiff performed the contract in its entirety. Specifically the Court finds the language in the contract required Kreske to cover any portion of the estimate not covered by insurance was clearly signed and executed by

Kreske. He is an adult person. Although he claims he did not read but concedes he signed the contract, he is therefore bound by the terms and conditions of that written contract. The instant contract also requires that if Diamond submits the account for collection that Kreske agreed to paid interest at 1.5% per month or at the highest rate allowed by law, court costs, reasonable attorney's fees and all costs of collections. The overwhelming evidence at trial indicates plaintiff performed all terms and conditions of the contract and Kreske made no complaints about Diamond's performance prior to trial.

Clearly there was no fraud by Diamond in correcting the estimate to delete some bathroom repair work and other times to save Kreske money. Kreske has offered no factual basis as why he has not paid Diamond or signed over to insurance proceeds to Diamond or paid Diamond pursuant to the terms of the written contract.

Plaintiff's counsel is directed within ten (10) calendar days to file the affidavit of attorney's fees. Mr. Ramunno is granted ten (10) calendar days to respond to plaintiff's counsel's request.

Judgment is therefore entered in the amount of \$17,378.32 plus pre and post judgment interest pursuant to 6 *Del.C.* §2301 *et seq.* as well as attorney's fees, and costs.

IT IS SO ORDERED this 13th day of September, 2006.

John K. Welch
Judge

/jb
cc: Rebecca A. Dutton, Case Processor

CCP, Civil Division